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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND NICKOLAS SHANDS, Defendant and Appellant.	C087414 (Super. Ct. No. STK-CR-FE-2015-0016861)

Defendant Raymond Nickolas Shands appeals from convictions of multiple crimes arising from his sexual assault of two children. Defendant contends the trial court prejudicially erred in instructing the jury with CALCRIM No. 1190, in conjunction with CALCRIM No. 301, because the instruction lightened the prosecutor's burden of proof by bolstering the victims' testimony. We will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Due to the limited nature of the claim on appeal, we need not recite defendant's crimes in any detail. It suffices to say that defendant committed multiple sexual acts on a

family member's two young daughters. Defendant was convicted following a jury trial of oral copulation or penetration with a child 10 years old or younger (Pen. Code, § 288.7, subd. (b)),[1] two counts of committing a lewd act upon a child (§ 288, subd. (a)), and one count of attempted to commit a lewd act upon a child (§ 664/288, subd. (a)). The jury also found true that the offenses involved multiple victims. (§ 667.61, subd. (e)(4).)

The trial court sentenced defendant to an aggregate term of 15 years to life. The court struck the enhancements as a matter of law because there were not multiple convictions as required given that one of the counts was an attempt rather than a completed act.

DISCUSSION

The trial court gave two instructions stating that a single witness can prove any fact. The first was CALCRIM No. 301, which stated: "The[] testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence." The second at issue here, was CALCRIM No. 1190, which is specifically tailored for use in cases involving a sex offense. As given here, CALCRIM No. 1190 stated as follows: "Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone." Defendant contends the trial court erred in instructing the jury with CALCRIM No. 1190 because in combination with CALCRIM No. 301, the instruction impermissibly lightened the prosecution's burden of proof by bolstering a victim's testimony, violating his federal constitutional right to due process.

Although the Attorney General contends the issue is forfeited, we need not address that question because defendant's contention lacks merit. The California Supreme Court has held that substantively similar predecessor CALJIC instructions to CALCRIM Nos. 301 and 1190 are correct in law. As stated in *People v. Gammage* (1992) 2 Cal.4th 693,

[1] Undesignated statutory references are to the Penal Code.

700 (*Gammage*): "It is not disputed that both CALJIC No. 2.27 [the predecessor of CALCRIM No. 301] and No. 10.60 [the predecessor of CALCRIM No. 1190], considered separately, correctly state the law. 'In California conviction of a sex crime may be sustained upon the uncorroborated testimony of the prosecutrix.' [Citation.] We specifically upheld an instruction equivalent to CALJIC No. 10.60 as long ago as 1912. [Citation.]" Our high court further reasoned: "Although the two instructions overlap to some extent, each has a different focus. CALJIC No. 2.27 focuses on how the jury should evaluate a fact (or at least a fact required to be established by the prosecution) proved solely by the testimony of a single witness. It is given with other instructions advising the jury how to engage in the *fact-finding* process. CALJIC No. 10.60, on the other hand, declares a substantive rule of law, that the testimony of the complaining witness need not be corroborated. It is given with other instructions on the legal elements of the charged crimes." (*Gammage*, at pp. 700-701.) The instructions remain just as correct in law when given in combination as they are individually. (*Id.* at p. 701.)

Defendant concedes that *Gammage* is controlling but urges that the case was wrongly decided and has become outdated with the passage of time. Defendant reiterates the same arguments raised and rejected by our high court in *Gammage*. We are bound by the decisions of the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) The passage of time has no effect on the appropriateness of CALCRIM No. 1190; indeed, in *Gammage*, the court stated: "[E]ven if we were to assume, which we do not, that all juries are aware of the no-corroboration requirement, or would glean it from [CALCRIM No. 301] itself, no harm is done in reminding juries of the rule." (*Gammage, supra*, 2 Cal.4th at p. 701.) There was no instructional error.

DISPOSITION

The judgment is affirmed.

/s/
BLEASE, Acting P. J.

We concur:

/s/
HULL, J.

/s/
MAURO, J.